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## DAMAGES AT THE BORDERS OF LEGAL REASONING

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### I. INTRODUCTION

IN *Borders (U.K.) Ltd. and others v. Commissioner of Police of the Metropolis and another*,<sup>1</sup> the Court of Appeal has, yet again, succumbed to the “temptation to do justice”<sup>2</sup> by further extending to claimants a disgorgement remedy on the claimed authority of *A.G. v. Blake (Jonathan Cape Ltd. Third Party)*.<sup>3</sup> We say “claimed authority” because, yet again, the extension of the disgorgement remedy is impossible to justify using legal argument respectful of precedent, for such argument is subordinated to the direct “pursuit of the justice of the outcome” (para. [28]). The court frankly acknowledged that its judgement “has to make up in justice what it lacks in logic” (para. [28]). As the court believed the case of the second defendant (hereinafter the defendant) to be wholly “unembarrassed by any merits” (para. [14]), “justice” appeared to require that he be mulcted, and this is what the court has made it possible for the claimant, with the particular assistance of the state in this case, most thoroughly to do.

And, yet again, all this is unwise. The defendant, who received a term of 30 months’ imprisonment for the offences which gave rise to this litigation, could not be said to be in the strongest position. But as the court’s treatment of even this defendant is wholly questionable as policy, the outcome the court has striven to produce is bereft of justification. If one leaves the shelter of precedent to embark upon judicial legislation, one had better identify the right policy. Why it has become quite common for appeal court judges to believe they are able to perform the very difficult trick of legislation from the bench will not be discussed here. What will be argued is that the *Blake* disgorgement remedy is

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<sup>1</sup> [2005] EWCA Civ 197, [2005] All E.R. (D.) 60 (Mar). Unattributed references in parentheses are to this case. This was a unanimous decision by May, Sedley and Rix L.JJ. in which the principal judgement was given by Sedley L.J.

<sup>2</sup> N. Andrews, “Civil Disgorgement of Wrongdoers’ Gains: The Temptation to do Justice” in W.R. Cornish *et al.* (eds.), *Restitution: Past, Present and Future* (Oxford 1998), ch. 10.

<sup>3</sup> [1997] Ch. 84 (Ch. D.); [1998] Ch. 439 (C.A.); and [2001] 1 A.C. 268 (H.L.).

a Trojan Horse which allows this way of deciding cases into the law of damages. Or, to put the matter the other way around, the *Blake* remedy is itself so wholly opposed to the balance and cautious growth central to the common law of damages that it can be advanced only by this sort of reasoning, which disdains the “straight-jacket” of precedent in order to give a decision which serves “the interests of justice” (para. [43]).

## II. THE FACTS AND THE PROCEEDINGS<sup>4</sup>

On 16 January 2004, the defendant, Mr. Ronald Jordan, a street trader, was convicted by Southwark Crown Court of conspiracy to steal and of handling stolen goods. For at least three years previously, Jordan had employed thieves to steal books from the bookshops of *inter alios* the claimants, members of the Booksellers’ Association Loss Protection Consortium (BALPC), which he then sold from street market stalls. Jordan appears to have organised the theft of some 250,000(!) books, from the sale of which he made an estimated annual profit of over £300,000, of which over £600,000 was identified to him during the criminal proceedings.

Jordan was a brazen criminal. He constantly operated his market stalls without licences and accepted consequent arrests and fines as a cost of doing business (to the extent that he ever paid the fines). He constantly attempted to evade payment of tax. He chose for his thieves mainly drug addicts who, desperate for cash, would sell him the books they had stolen for small sums by comparison to the price for which he then sold them. It is only a certain sort of person who would be able successfully to deal in ready cash with drug addicts in this way, and Jordan used intimidation to assist him in resisting investigation of the source of his stock (some of which was obtained legally). But Jordan was no master criminal. He eventually was imprisoned because he simply persisted in foolishly ignoring the possibility of his ultimate conviction, and so much of his proceeds remained to be identified to him because he was an unsavoury man who, despite his wealth, continued to live in repulsive squalor.

Criminal proceedings to confiscate (part of) the £600,000 were begun under sections 71 and 72AA of the Criminal Justice Act 1988.<sup>5</sup> These were adjourned pending the outcome of the present case. Also as part of the criminal proceedings, the claimants

<sup>4</sup> In addition to the facts stated in *Borders* itself, we have read many newspaper, trade paper, local authority and police accounts of Jordan’s career, the most full of which appears to be R. Hanks, “Brought to Book” (9 March 2004) *The Independent*.

<sup>5</sup> The Criminal Justice Act 1988, pt. 2 has been superseded by the Proceeds of Crime Act 2002, pt. 2.

applied for a compensation order under section 130 of the Powers of the Criminal Courts Act 2000. Subsequent to the assessment of damages in the present, civil action, this application was withdrawn.

For reasons which will not be discussed here, establishing the evidence necessary to convict Jordan was extremely difficult, involving numerous frustrated attempts to prosecute him prior to the ultimately successful one. The eventual securing of a conviction required a very considerable effort on the part of the claimants, who had formed BALPC largely in the attempt to close down Jordan's operation, and who had to go to great lengths, such as marking their stock with ultraviolet ink and having Jordan placed under observation, to do so. It also required, in the words of the criminal trial judge, "immense application" by the City of London Police.<sup>6</sup> We imagine, though it is not clear from the transcript, that these circumstances played some part in the claimant framing what appears to be a most conservative claim for compensatory damages. The present action concerned only fewer than 50,000 books seized from Jordan's stall, van, house and lock-up, and Jordan's claim that he had been running his operation for only three years was accepted, as was police evidence which calculated Jordan's profit per book at what appears to be a very low figure.

In the first hearing of the present, civil action, the claimants were awarded compensatory damages of £279,594.89 in total. Ignoring a subsidiary component of this award, its bulk, £233,143.25, was compensation for the conversion of 42,102 books, assessed as the retail price of the books when stolen minus their resale value when recovered. Though we shall comment on this use of the retail price of the books below,<sup>7</sup> we will eschew discussion of the precise quantification of the compensatory damages, which had aspects which worked both for and against the defendant.

The present appeal turned on a further award of £100,000 in exemplary damages. Master Leslie, assessing the compensatory damages, undoubtedly believed that 42,102 books represented only a fraction of the books Jordan had converted, and that he actually made more profit per book than the police evidence claimed. Although he allowed Jordan credit for overheads, such as running his van and lock-up, Master Leslie arrived at round figures of £20,000, £30,000 and £50,000 as the net profits from Jordan's sales of these books over three years, and awarded their sum of £100,000

<sup>6</sup> Anon, "City Police Shut Down Book Theft Network" (6 February 2004) *City of London Police News and Events* < <http://www.cityoflondon.police.uk/news/2004/feb-6-04.html> > .

<sup>7</sup> See the text accompanying note 59 below.

as exemplary damages. In justification of this award, Master Leslie said:

I am confident that [Jordan] earned a great deal more than that ... But I also bear in mind that there is an element of punishment here—but it is not really punishment: it is intended to be—and I think I am entitled to say this on the authorities—a deprivation of wholly wrongfully obtained profit. That is the way the claim is put in the particulars of claim and it is the way I have attempted to assess these exemplary damages (quoted at para. [11]).

### III. THE USE OF *BLAKE*

In *Borders*, even more than in *Experience Hendrix LLC v. PPX Enterprises Inc.*, *Edward Chalpin*,<sup>8</sup> it is not at all clear why the claimant chose to state its claim in the, to quote the Court of Appeal, “hazardous” way it did (para. [13]). Ignoring the marked conservatism of the basic claim for compensatory damages, it remains unclear why the claimant did not claim further *compensatory* damages in respect of the books which were not recovered. The argument need not be pursued at length because the Court of Appeal told us that it would have succeeded had it been used at first instance (para. [13]), as the court believes it should have been (para. [28]). If it had, then, of course, “the issue [of the appeal] ... need never have arisen” (para. [12]).

There are two reasons why the course taken by the claimants was so hazardous. First, as the criminal proceedings already contemplated securing part or all of Jordan’s £600,000 by means of confiscation and compensation, and as the Criminal Justice Act 1988, section 71(1C) permitted but did not require that sums recovered from a defendant by civil action be set off against confiscation proceedings, a civil award threatened to expose Jordan to the “double jeopardy” (para. [17]) of loss of the £100,000 twice (para. [14]).<sup>9</sup> This is not only abhorrent in principle but was specifically disapproved in the important case of *Archer v. Brown*.<sup>10</sup> For reasons which do not appear to be publicly available, but the nature of which it is possible to imagine, the court has stated that it could “confidently anticipate that Mr. Jordan will not be mulcted

<sup>8</sup> [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm.) 830.

<sup>9</sup> And equally to, potentially, allow the claimants double recovery, on which see the text associated with note 28 below.

<sup>10</sup> [1985] Q.B. 401, 426. The Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Report No. 247, 1997) paras. 4.36–4.43 has queried the position set out in *Archer v. Brown*, and, although the case is not discussed in this perfectly opaque part of the reasoning in *Borders*, no doubt *Borders* will sanction such questioning.

in the same sum twice" (para. [17]).<sup>11</sup> Whilst we find this position extremely unsatisfactory, we propose to leave it for discussion by those more competent to deal with this latest blurring of the criminal and the civil law, though undoubtedly the most important aspect of this case is that it shows how much the appeal courts currently are prepared to assist in this blurring.

The second reason why the claimants' course was hazardous is that it involves an extension of exemplary damages. For the claimant to succeed, what should have been pleaded as compensatory damages have to be recoverable as exemplary damages, and one of the very few things one can say with confidence about the vexed topic of exemplary damages is that there is no clear authority for this. The Court of Appeal states that: "The key issue is ... whether there is today any room within the concept of exemplary damages for quantified losses, or whether the two are mutually exclusive" (para. [18]), and draws on the authority of Lord Nicholls in *Kuddus v. Chief Constable of Leicestershire Constabulary*<sup>12</sup> to say what is so uncontroversial as to need no discussion here, that there is, "to all appearances, a doctrine of mutual exclusivity" between compensatory and exemplary damages, such that the latter are "additional to," not congruent with, the former (para. [22]).

The Court of Appeal also notes what is equally uncontroversial: that in *Rookes v. Barnard* exemplary damages were identified as "an anomaly" which it was regretted could not be abolished,<sup>13</sup> and that that case, reinforced by *Broome v. Cassell and Co. Ltd.*,<sup>14</sup> sought to confine those damages to their scope in 1964. There now is, for reasons which constraints of space prevent us from going into here, academic argument for the extension of exemplary damages, supported, after much thought, by the Law Commission,<sup>15</sup> and

<sup>11</sup> The court tells us that this means that "the probable practical relevance of the appeal is to decide whether the £100,000 ... goes to the ... victims under the civil judgement or to the state under the confiscation order" (para. [46]). With respect, this does not explain the reasons for the abandonment of the criminal proceedings for compensation. Under the Criminal Justice Act 1988, as amended, a compensation order took precedence over a confiscation order; the Crown Court could award an unlimited sum in compensation; and, despite his sentence of imprisonment, Jordan had the means with which to meet a compensation order. It would appear that the court has accepted that it was not possible to obtain more than £233,143.25 through a criminal compensation order, where loss must be proven (*R v. Watson* (1990) 12 Cr. App. R. (S) 508), and the court must not "simply pluck a figure out of the air" (*R v. Swann and Webster* (1984) 6 Cr. App. R. (S) 22, 25, both cases interpreting legislation from which The Powers of the Criminal Courts Act 2000, s. 130 is derived), and has turned to the civil law because it would make a greater sum available to the claimant, as indeed it would if the court's treatment of exemplary damages were good law.

<sup>12</sup> [2002] 2 A.C. 122, at paras. [50]–[52].

<sup>13</sup> [1964] A.C. 1129, 1221, 1225–26.

<sup>14</sup> [1972] A.C. 1027, 1082.

<sup>15</sup> Law Commission, note 10 above, para. 1.14. The personal views of the Law Commissioner at the time of the Report, Professor Burrows, tended towards the abolition of exemplary damages: A. Burrows, *Remedies for Torts and Breach of Contract*, 2nd ed. (London 1994),

*Kuddus*, as we shall see, manages the extraordinary feat of arguing for both the abolition *and* the extension of these damages.<sup>16</sup> Nevertheless, the Court of Appeal recognises that the English civil law displays an antipathy to exemplary damages and particularly to their extension; and this is, in our opinion,<sup>17</sup> right as law and right as policy (if abolition is not available).

The reader of the previous two paragraphs may, then, be surprised to be told that the result of the Court of Appeal's judgement is that the claimants were able to recover the £100,000 as exemplary damages. The argument, so far as it may be rationally reconstructed, is as follows.

By far the most important of the three "categories" of cases in which *Rookes v. Barnard* allowed exemplary damages to be awarded is the second identified by Lord Devlin: where the defendant, with "a cynical disregard" for the claimant's rights, "has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk."<sup>18</sup> As *Rookes v. Barnard* was decided in what now seems like a very remote world where a strong distinction was drawn between criminal and civil law, a distinction *Rookes v. Barnard* itself sought to strengthen,<sup>19</sup> one might well argue that the calculation one imagines Jordan made in respect of the criminal offences which led to this litigation does not fit into the second category, which Lord Devlin was prepared to accept did not cover "malicious injuries to property" because such injuries "can generally be punished as crimes."<sup>20</sup> But, although we shall say a little more of the confusion of criminal and civil law in this case, as Jordan's cynical disregard for BALPC's interests can hardly be doubted, let us accept that *Borders* fits into the second category of exemplary damages.

As it was the case that the Court of Appeal believed the £100,000 to be, in reality, compensatory damages, even if one accepts that the £100,000 is the product of Jordan's cynical disregard, there still remains the question "of the calculus on which the purportedly exemplary award was sought and made" (para.

pp. 282–5 and A. Burrows, "Reforming Exemplary Damages: Expansion or Abolition" in P. Birks (ed.), *Wrongs and Remedies in the Twenty-first Century* (Oxford 1996), p. 153.

<sup>16</sup> See the text accompanying note 30 below.

<sup>17</sup> D. Harris *et al.*, *Remedies in Contract and Tort*, 2nd ed. (London 2002), ch. 30.

<sup>18</sup> *Rookes v. Barnard* [1964] A.C. 1129, 1227. Another formulation given in *Broome v. Cassell and Co. Ltd.* [1972] A.C. 1027, 1079 was that the defendant's "prospects of material advantage outweigh the prospects of material loss."

<sup>19</sup> *Rookes v. Barnard* [1964] A.C. 1129, 1230 *per* Lord Devlin: "I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law." See also *Broome v. Cassell and Co. Ltd.* [1972] A.C. 1027, 1087 *per* Lord Reid: "to allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders."

<sup>20</sup> *Rookes v. Barnard* [1964] A.C. 1221, 1230.

[24]). Lord Devlin's second category looks to give something additional to render fruitless the defendant's calculation about his liability for compensation of the claimant's loss. It was never contemplated that compensatory damages as such would be awarded as exemplary damages. The notion makes no sense in terms of what we have previously understood of exemplary damages. The Court of Appeal overcame this problem, to its own satisfaction at least, by saying that what is really going on in Lord Devlin's second category is the prevention of unjust enrichment (para. [25]). The court placed great reliance on comments which can, in their differing ways, be interpreted to this effect in Lord Diplock's speech in *Broome v. Cassell*,<sup>21</sup> and in Lord Scott's speech in *Kuddus*.<sup>22</sup> But, in truth, the court does not seek to follow the law but, though conscious it "is not a source of present law" (para. [26]), to follow the argument of *McGregor on Damages*, that "the real purpose behind this second common law category is not the punishment of the defendant but the prevention of his unjust enrichment."<sup>23</sup> In sum, *McGregor's* argument

helps to bring the two theories (of exemplary and restitutionary damages) into a single frame by suggesting (as Lord Scott suggested in *Kuddus*) that a modern enhanced compensatory regime is capable of subsuming the need for punitive awards. When one recalls that the rationale of the second category of exemplary damages is, precisely, the confiscation of profits which cannot be got at through the ordinary compensatory mechanisms, this is an attractive synthesis (para. [26]).

We do not pretend to be able to expound fully the chain of reasoning the court thought it was setting out here, but wish to make two points, not, in the first instance at least, about this form of reasoning, but about the substance of the position the court takes up.<sup>24</sup>

<sup>21</sup> [1972] A.C. 1027, 1129.

<sup>22</sup> [2002] 2 A.C. 122, at para. [109].

<sup>23</sup> 17th ed. (London 2003), para. 11.027.

<sup>24</sup> In a desperate attempt to preserve some order in our discussion of this convoluted and confused case, we shall relegate to a footnote one other point of substance which might be made. The Court of Appeal focusses on Lord Devlin's categories test, but nowhere deals with the problems that must be caused by the fact that, as no common law cases of exemplary damages for conversion had been decided prior to *Rookes v. Barnard*, what the court does contradicts Lord Devlin's "cause of action" test. This test, an unsatisfactory compromise at best, is probably outright indefensible in respect of conversion, for trespass to goods does satisfy the cause of action test; and, anyway, after *Kuddus*, note 12 above, it would appear that the cause of action test by no means absolute: cf. *Banks v. Cox* [2002] EWHC 2166, at para. [13] on deceit, discussed by one of the current authors in J. Poole and J. Devenney, "Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles" [2006] J.B.L. (forthcoming). Largely disregarding the cause of action test, we shall consider whether exemplary damages should be awarded.



The argument throughout *Borders* is that the £100,000 should have been pleaded as compensatory damages. When it is awarded on the *Blake* basis of disgorgement of enrichment by wrongdoing, it is not awarded as compensatory damages at all. If we can be excused for stating the obvious, the whole point of *Blake* is that the disgorgement remedy it made available for breach of simple contract is an alternative to compensatory damages because, it is claimed, such damages are inadequate. In *Borders*, it is believed that the claimants, even after receiving the £100,000, though better compensated, will still be inadequately compensated. Is it to be the case that, in future cases, disgorgement will be available only to (partially) remedy otherwise inadequate compensatory awards, or will the disgorgement remedy be available when compensation is adequate or, because the claimant suffers no loss (*e.g.* trespass which does not inflict damage to the land), damages are nominal?

We are faced with a recapitulation of the unresolved, and unresolvable, dispute of whether what was done in *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*<sup>25</sup> was a form of compensation or a form of restitution.<sup>26</sup> It was bad enough when one did not know whether the compensatory or the restitutionary measure, or both, should be available to claimants. Now, it seems, compensation is available *as* restitution in the form of exemplary damages, whatever this means; and in our opinion, given most hesitantly, it means nothing. Even if it did mean something, the problem set by *Wrotham Park* is increased. In addition to having to ask which sort of case justifies a departure from “axiomatic” compensatory damages,<sup>27</sup> we now have to ask which sort of case allows one to claim compensatory damages as “exemplary-restitutionary” damages. It is evident that the Court of Appeal has managed to do what one thought was impossible by increasing the confusion that attends the distinction between “aggravated” (as extra-compensatory) and “exemplary” (as punitive) damages. We cannot say anything helpful about this.

It is also clear that, though the court was prepared to do more or less anything to improve the claimants’ award by allowing “the confiscation [*sic*] of profits which cannot be got at through the ordinary compensatory mechanisms” (para. [26]), it did so only to better approximate to the level of what the court believed to be the claimants’ real loss. The court would not have awarded more than a limit set by the claimants’ real loss, for such an award would be

<sup>25</sup> [1974] 1 W.L.R. 798.

<sup>26</sup> Harris *et al.*, note 17 above, pp. 258–62.

<sup>27</sup> *A.G. v. Blake (Jonathan Cape Ltd. Third Party)* [1998] Ch. 439, 448 (C.A.); [2001] 1 A.C. 268, 282 (H.L.).

a “double recovery” windfall to them (paras. [27], [43] and [47]). But does this (ironically) mean that there is a cap on the restitutionary recovery set by the limit of compensation of loss? Ignoring the fact that this requires the court to maintain it knows what this loss is (on other than the submitted evidence in support of statements of claim which were not actually made), it is a doctrinal development which will involve some difficulty, especially in respect of what seem to be relevant discussions of expectation ceilings in other areas of the law of damages.<sup>28</sup>

Notwithstanding what has just been said, perhaps the most extraordinary aspect of what is being done is that the authorities to which reference is made, even the persuasive authority of *McGregor*, are all being turned against themselves by a Court of Appeal which does not seem to realise what it is doing. The court makes reference, as we have seen, to Lord Scott’s speech in *Kuddus*. But in his speech his Lordship argued that, as, after *Blake*, “the profit made by a wrongdoer can be extracted from him” by restitutionary damages, there no longer is any need “to rely on the anomaly of exemplary damages.”<sup>29</sup> This is, to spell it out, an argument that exemplary damages can be curtailed (on the way to being dispensed with) if what Lord Devlin allowed under his second category can be placed on a restitutionary footing. It is not an argument that compensatory or restitutionary damages can be placed on an exemplary footing! The court does not seem to appreciate that the criticism of exemplary damages *tout court* is at least as much to the fore in *Kuddus*<sup>30</sup> as the criticism of the cause of action test that, whilst right in itself, admittedly was bound to have the opposite effect to the abolition of those damages. But the ambivalence of *Kuddus* can hardly be said to be characteristic of *Rookes v. Barnard* or *Broome v. Cassell*, which, of course, as the court (para. [19]), and everybody else, perfectly well knows, display a most grudging acceptance of exemplary damages. Nor is there much doubt about the nature of the argument from *McGregor* adopted by the court, for *McGregor* also seeks to diminish the scope of exemplary damages, looking forward to “the day when restitutionary damages will take over from Lord Devlin’s second category and make it unnecessary.”<sup>31</sup> This really must be a case of making the best of a bad lot, for *McGregor* also bitterly regrets that it “reluctantly” now has to talk of “restitutionary damages” at

<sup>28</sup> Harris *et al.*, note 17 above, pp. 238–40.

<sup>29</sup> [2002] 2 A.C. 122, at para. [109].

<sup>30</sup> E.g. [2002] 2 A.C. 122, at para. [72].

<sup>31</sup> *McGregor*, note 23 above, para. 11.046.

all.<sup>32</sup> In sum, even if one allows that interesting debate has been joined over the possibility of a restitutionary reinterpretation of Lord Devlin's "cynical disregard" category,<sup>33</sup> the Court of Appeal's use of *Blake* to *expand* the use of exemplary damages is, we are reluctantly obliged to say, no more than an *outré* interruption of this debate.

Perhaps it is wrong to dwell too long on the reasoning in *Borders*. It is an evident hatchet-job, made, it would seem, to ensure (after what the court seems to view as a questionable statement of case supported by inadequate evidence) that the defendant was punished and the claimants better compensated. And if one has already decided that justice requires the mulcting of a defendant in this way, then it would be a trivial accomplishment for far less able ratiocinators than Court of Appeal judges to use *Blake* to mulct him. The thrust of *Blake* is so flatly towards the prevention of wrongs that it has made it possible to require disgorgement for simple breach of contract, the "wrong" for which it is least appropriate to regard disgorgement as a default remedy,<sup>34</sup> and so requiring disgorgement in other circumstances is child's play.

All equivocation aside, in the restitutionary jurisprudence of *Blake*, wrongs are persuasively defined as, precisely, wrong, and corrective justice requires their prevention. Restitutionary damages which will be larger than compensatory damages will be more likely to prevent the wrong, with the complete disgorgement of the gains the defendant makes by commission of the wrong which is sanctioned by *Blake* being the logical apotheosis of the argument. But the suggestion "that there is a universally applicable principle that in every case there will be restitution of benefit from a wrong"<sup>35</sup> is a naïve formalism which typically does not understand

<sup>32</sup> *Ibid.*, para. 12.004. And, with all respect to *McGregor*, it has failed to give sufficient weight to a problem which, as one of the authors has already noted, attends its similar treatment of *Wrotham Park* hypothetical release damages: D. Campbell, "The Extinguishing of Contract" (2004) 67 M. L.R. 818, 823 note 24. What if there is a cynical tort committed in the expectation of profit but the profit does not in fact materialise? We do not doubt for a second that the proponents of restitution are able to come up with something that suits the purpose, indeed may already have done so; but will it improve our law to replace exemplary damages with restitution of an unjust enrichment that does not enrich? This difficulty had been noted in *Broome v. Cassell and Co. Ltd.* [1972] A.C. 1027, 1130.

<sup>33</sup> But see *Design Progression Limited v. Thurloe Properties Limited* [2004] EWHC 324, [2005] 1 W.L.R. 1, at para. [141] *per* Peter Smith J.: "[a]lthough it is clear that there was much debate in the House of Lords in *Kuddus* as to whether or not the punitive role of exemplary damages, in the case of the second limb, ought to be addressed more in restitutionary terms (see paragraph 109 of the speech of Lord Scott of Foscote), it is clear that the existing basis for the award of exemplary damages, namely to punish a wrongdoer for his conduct, remains the law."

<sup>34</sup> D. Campbell and D. Harris, "In Defence of Breach: A Critique of Restitution and the Performance Interest" (2002) 22 L.S. 208.

<sup>35</sup> *Halifax Building Society v. Thomas* [1996] Ch. 217, 227H.

that there are excellent reasons why we do not even seek to prevent some wrongs (e.g. breach of contract when damages are adequate),<sup>36</sup> and why we do not do everything in our power to prevent wrongs which it would normally be better were prevented (e.g. disclosure of confidential business information).<sup>37</sup> None of this can be appreciated in, as Hegel would have put it,<sup>38</sup> “the night in which all cows are black” created by *Blake*’s blanket condemnation of “wrongs.”

#### IV. STILL NO TELLING

What is much harder than applying the *Blake* remedy is, having got it to hand, developing a jurisprudence which allows one to know when and *when not* to use it. One can always make an argument for using it, as the Court of Appeal has facilely done in *Borders*. What the court has failed to do is develop at all robust rules for deciding when, as a matter of law rather than prior intuition about what is just, the *Blake* remedy should or should not be used.

We have been told that circumstances have to be “exceptional” to justify the *Blake* remedy,<sup>39</sup> but we have no way of telling what those circumstances are.<sup>40</sup> One way which was canvassed by the Court of Appeal which heard *Blake* is to focus on “the moral calibre of the defendant’s conduct.”<sup>41</sup> That the breach was “deliberate and cynical,” or involved “skimping on performance” or “doing exactly what one promised one would not do,” were advanced as circumstances justifying the alternative award.<sup>42</sup> But serious reflection shows that, for reasons which one of the present authors has already discussed many times elsewhere and so will not be recapitulated here,<sup>43</sup> all of these are unsatisfactory reasons to depart from compensatory damages, and there was a marked hesitation about all of them in the House of Lords’ hearing of *Blake*.<sup>44</sup> They have surfaced in cases subsequent to *Blake*, but, in the interests of coherent legal argument, they have no business doing so.<sup>45</sup>

<sup>36</sup> Campbell and Harris, note 34 above.

<sup>37</sup> D. Campbell, “*Hamlet* without the Prince: How Leng and Leong Use Restitution to Extinguish Equity” [2003] J.B.L. 131.

<sup>38</sup> G.W.F. Hegel, *Phenomenology of Spirit* (Oxford 1977), p. 9.

<sup>39</sup> *A.G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 285G (H.L.).

<sup>40</sup> D. Campbell and P. Wylie, “Ain’t No Telling (Which Circumstances are Exceptional)” [2003] C.L.J. 605.

<sup>41</sup> *A.G. v. Blake (Jonathan Cape Ltd. Third Party)* [1998] Ch. 439, 456H (C.A.).

<sup>42</sup> *Ibid.*, pp. 457–8.

<sup>43</sup> Harris *et al.*, note 17 above, pp. 18–19, 213–14, 274–75, 200–8, 275–76.

<sup>44</sup> *A.G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 277G, 291D (H.L.).

<sup>45</sup> That the defendant “did the very thing it contracted not to do” was decisive in *Esso Petroleum Co. Ltd. v. NIAD Ltd.*, unreported, 22 November 2001 (Ch.D.), at para. [60]. But it

In *Borders*, it is the law of exemplary damages that furnishes the grounds for the *Blake* award. “Exemplary damages,” we are told, “fill a moral gap” (para. [26]), and “can be awarded, ultimately in the interests of justice, to punish and deter outrageous conduct on the part of the defendant” (para. [43]). So long as one’s own interests are not at the mercy of this sort of stuff, one can hardly suppress a smile at the thought of turning to the law of exemplary damages to assist the refinement of our damages jurisprudence, but let us examine what is involved. If, starting with Lord Devlin’s second category, we are to base an extension of exemplary damages on the “cynicism” of the defendant’s conduct, then surely *Borders* creates the new problem that this runs completely counter to the retreat from the “deliberate and cynical” ground by the House of Lords in *Blake*!<sup>46</sup> This obviously means that awarding a disgorgement remedy, supposedly derived from *Blake*, as exemplary damages on the supposed authority of Lord Devlin’s second category, is quite contradictory. In sum, we can only repeat what one of the current authors has already said of the law on this point after *Blake*: that law is a dreadful mess, and nothing ultimately can be done to straighten this mess out.<sup>47</sup>

For those who have reached this conclusion to advance further comment on *Blake* can be justified only by their seeking to limit the mischief that this case is causing, and it is to the specific mischief in *Borders* that we now turn. To come to terms with decisions like *Borders*, one is wise to abandon most of what one knows of legal reasoning and simply recognise outright that the court, because it believes it knows what is just for reasons, as it were, prior to the decided law, has sought to mulct the defendant, and *Blake*, which is based on a blanket repugnance of wrongdoing, is just the tool for this job. Faced with this, the only way to conduct a productive discussion of the detail of cases like *Borders*

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is in *Experience Hendrix LLC v. PPX Enterprises Inc*, *Edward Chalpin* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm.) 830, at para. [44] that some sort of measuring of the moral turpitude thought to be involved in the wrongdoing has so far been most fully canvassed, with George Blake’s treason the nadir to which the conduct of others could be compared. Jordan’s criminality might be thought to give rise to the closest set of facts to *Blake* which have so far arisen. But we are spared having to describe the difficulties of the moral estimations called for in *Hendrix* because the court does not bother with them in *Borders*. Having assumed that Jordan’s position does not have “arguments”, it no doubt is difficult to consider whether, after all, there might not be a difference between Ronald Jordan’s criminality and Blake’s treason, but we shall return to the nature of Jordan’s criminality below.

<sup>46</sup> Once again in an attempt to preserve order in our argument, we confine to a footnote the clash of the Court of Appeal’s approach in *Borders* with the Law Commission’s argument (note 10 above, para. 1.52) for placing damages for “proprietary torts” such as conversion on a restitutionary footing. A major advantage of so doing was claimed to be that it made it possible to award damages in excess of the compensatory measure in the absence of “deliberate and outrageous conduct,” for “the basis of the restitutionary liability is strict.”

<sup>47</sup> Campbell and Yllie, note 40 above, p. 610.

which purport to follow *Blake* is to put the damage to the rule of law to one side and ask what is the merit as policy of what is done?

#### V. FAGIN IN THE MODERN MANNER

It was inevitable that the Court of Appeal would take up the popular description<sup>48</sup> of Jordan as a “literary” Fagin (para. [1]), for so, indeed, he was. But there is an irony in this description which the court fails to appreciate. For Jordan was a “modern day”<sup>49</sup> Fagin in a strong sense, in that the rationale of his crime is traceable to developments in the law around the time when, in 1838, Dickens published *Oliver Twist*. For the essential aspect of Jordan’s crime was not that it involved theft, but that it involved copyright. In 1838, prior to the Copyright Act 1842,<sup>50</sup> effective copyright protection was vestigial by comparison to what now exists,<sup>51</sup> and Dickens himself felt sufficiently angry about what he believed to be the inadequate protection of his work that he attacked the existing law in a famous passage of *Nicholas Nickleby*.<sup>52</sup> Dickens had an important role in the development of modern copyright, for he successfully put his tremendous influence particularly behind improving international protection (his sales in the United States, and associated earnings particularly from reading tours there, were very large).<sup>53</sup> Things are rather different now, and Jordan’s operation was a response to the very extensive system of copyright protection that now obtains.

The size and success of Jordan’s operation, and its longevity in view of its size, are, on a first look, remarkable. The Court of Appeal states its view of the reason for this success briefly: “Since his overheads and outlays were somewhat less onerous than those of a legitimate bookseller, Mr. Jordan made very considerable profits” (para. [1]). This is, with all respect, an insufficient understanding of Jordan’s business to ground judicial legislation in respect of the mischief it posed. In order to realise his profits from the stolen books, Jordan had to sell them, and this he had no trouble whatsoever in doing. He was able to sell an average of 100 books a day, seven days a week, all the year round, for a number

<sup>48</sup> Anon, “Book Theft Boss Must Pay Damages” (3 March 2005) *BBC News* < [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/4314663.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4314663.stm) > .

<sup>49</sup> J. Davenport, “Rogue Trader Operated ‘Fagin’ Gang” (20 January 2004) *This is London [News and City Section]* < <http://www.thisislondon.co.uk/news/articles/8671594> > .

<sup>50</sup> 5 and 6 Vic, c 45.

<sup>51</sup> J. Feather, *Publishing, Piracy and Politics* (London 1994), ch. 5 and C. Seville, *Literary Copyright Reform in Early Victorian England* (Cambridge 1999).

<sup>52</sup> (London 1933), pp. 552–23.

<sup>53</sup> A.J. Kappel and R.L. Patten, “Dickens’ Second American Reading Tour and His ‘Utterly Worthless and Profitless’ American Rights” (1978) 7 *Dickens Studies Annual* 1.

of years. He is likely to have had tens of thousands of customers. It cannot, therefore, be denied that there was a very strong demand for what he was doing. This was so because the price of the books when sold by members of BALPC, under protection of the copyright monopoly, was much higher than the price which would have been fixed by competition.<sup>54</sup> Jordan's overheads and outlays were indeed "less onerous" than those of the members of BALPC, but the level of their overheads and outlays is set within a framework in which the price competition which would drive that level down is heavily restricted. For Jordan to undercut the price charged by the members of BALPC was rather easy, and it is not nearly enough to say that he did this only by illegal means, for most price competition in bookselling would contravene the Copyright, Designs and Patents Act 1988.

We hope to have made our opinion of Jordan's personal qualities clear. The point is that the current regulatory framework makes it highly likely that only persons of his stamp will make price competition the basis of their business should they engage in bookselling. And as economic policy normally does not seek to eliminate but to promote price competition because it is an inestimable good, it is a significant mistake to believe, as we have seen the Court of Appeal centrally does believe, that even Jordan's position is wholly "unembarrassed by any merits" (para. [14]). Even in this case, it is not necessarily a question of continually devising laws which ever more thoroughly mulct the defendant. It is a question of balance.

Though it would seem that even our small competence to discuss the law and economics of the book trade is greater than that of the Court of Appeal, because, on the evidence of its view of the nature of Jordan's business, the court's competence is zero, this is not the place to do so. However, that the court has seen fit to engage in judicial legislation gives rise to two questions. The first is: is it sensible to grant a copyright monopoly which will be bound to create a very substantial incentive to its infringement, and to criminal acts if the infringement is defined as criminal, or to criminal acts pursuant to the infringement whether or not the infringement is itself criminalised? The second is: is it sensible to seek to extend criminal and civil remedies to make the monopoly absolute? The economic and legal justifications for copyright in general are wholly questionable,<sup>55</sup> and the shape the industrial

<sup>54</sup> We ignore the collective administration of prices central to the book trade until recently, which was supposed to have come to an end with the abandonment of the Net Book Agreement in 1995.

<sup>55</sup> For the views of one of the present authors see S. Picciotto and D. Campbell, "Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property" in A.

organization of the book trade has taken under the influence of the copyright monopoly is widely deprecated for its economic shortcomings<sup>56</sup> and its encouragement of philistinism.<sup>57</sup> However, the very existence of the statutory copyright regime, and *a fortiori* its flourishing state, makes it unprofitable to discuss the matter at this fundamental level here; for our purposes, the existence of copyright must be accepted. What can be discussed with profit is the extent of the protection that adjudication should recognise is afforded to the copyright monopoly and how this relates to what was done in *Borders*.

The underlying moral atmosphere of *Borders* is a feeling that something must be done “in the interests of justice” to prevent the claimants being inadequately compensated. But the basic measure of the compensatory damages awarded, of the retail value of the books when they were stolen (minus their resale value when recovered), though defensible as conversion damages, arguably itself involves very considerable overcompensation. Had the claimants merely replenished the books from the printers, the cost of doing so would have been a small fraction of the resale value. We are not arguing that the cost of replacement in this way is the right measure of damages, but it is most important to see that what really is at issue in *Borders* is not the conversion of the physical books but the “conversion” of the revenues which accrue from the copyright monopoly, and once this is acknowledged, then the waters become very deep indeed. It is particularly unfortunate that *Borders* proceeds without reference to the extensive criticism<sup>58</sup> of the punitive nature and excessive compensation involved in adding conversion damages to other remedies (including compensatory damages) for copyright infringement, which led to the abolition of such conversion damages in 1988.<sup>59</sup>

As *Borders* did involve conversion of BALPC’s actual books and not only the copyrighted interest, it might, indeed, readily be distinguished from the situations normally envisaged by the 1988 Act. But, as in *Borders* we are not really dealing with adjudication but with judicial legislation, this legislation would have benefited from consideration of the position taken on damages for

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Hudson (ed.), *New Perspectives on Property Law: Obligations and Restitution* (London 2003), ch. 14 and D. Campbell and S. Picciotto, “The Acceptable Face of Intervention: Intellectual Property in Posnerian Law and Economics” (forthcoming 2006) *Social and Legal Studies*. In the opinion of this author, still by far the most profound contribution to the discussion of copyright is A. Plant, “The Economic Aspect of Copyright in Books” in *Selected Economic Essays and Addresses* (London 1974), ch. 4.

<sup>56</sup> R. Towse, *Creativity, Incentive and Reward* (Cheltenham 2001).

<sup>57</sup> A. Schiffrin, *The Business of Books* (London 2000).

<sup>58</sup> *Report of the Committee to Consider the Law on Copyright and Designs* (Chair Mr. Justice Whitford) (Cmnd 6732 1977) para. 943 and e.g. *Infabrics v. Jaytex* [1982] A.C. 1.

<sup>59</sup> Copyright, Designs and Patents Act 1988, s. 170 and Sched. 1, para. 31(2).



conversion in the law of copyright. These damages are, as a matter of legislative history,<sup>60</sup> intimately related to the present statutory provision for damages in excess of the compensatory measure for infringement of copyright. But there is no common law authority for the award of exemplary damages for copyright infringement, and so these should be ruled out under the cause of action test in *Rookes v. Barnard*.<sup>61</sup> There also is no settled authority that exemplary damages can be awarded for infringement under the Copyright, Designs and Patents Act 1988, section 97(2),<sup>62</sup> and the leading work on the subject is of the opinion that they should not be.<sup>63</sup> It has also been held that normal compensatory damages under section 96(2) of that Act, and “additional” damages under section 97(2), are available only in the alternative to the account of profits effectively granted in *Borders*.<sup>64</sup>

To draw all this to an end, it is necessary to say only that the level of protection of copyright provided by the remedies regime even after all these things are taken into account is regarded by our leading intellectual property judges as already giving claimants excessive rights,<sup>65</sup> and that no-one who understands the issues can think it an unambiguously good idea to grant remedies which would move us towards making the intellectual property right really absolute, for it is unarguable that the current formal system of copyright is remotely tolerable only because its widespread infringement is readily possible.<sup>66</sup> Though what has been done in *Borders* fits the pattern in intellectual property cases of trying to counter uncertainty of enforcement by the draconian quality of any punishment actually meted out, it certainly is not the case that even those to whom the terror weapon of punishment of this nature has been extended are confident it will work. So prone to competitive attack is the monopoly price that even a spokesperson of the publishing company most affected by Jordan’s operation has said

<sup>60</sup> Whitford Committee, note 58 above, para. 704.

<sup>61</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper No. 132, 1993), paras. 3.55–3.64.

<sup>62</sup> Law Commission, note 10 above, paras. 4.21 and 4.22. The previous position under The Copyright Act 1956, s. 17(3) was discussed in *Rookes v Barnard*, [1964] A.C. 1129, 1225, and in *Broome v Cassell and Co. Ltd.* [1972] A.C. 1027, 1080, 1134, but these discussions were not, of course, themselves discussed in *Borders*.

<sup>63</sup> H. Laddie *et al.*, *The Modern Law of Copyright and Designs*, 3rd ed. (London 2000) para. 39.42. This paragraph of this excellent work could almost be quoted *verbatim* as a response to what has been done in *Borders*.

<sup>64</sup> *Redrow Homes Ltd. v. Betts Bothers plc.* [1999] 1 A.C. 197.

<sup>65</sup> Hon. Sir Robin Jacob, “The Onward March of Intellectual Property Rights and Remedies” in R.C. Dreyfuss *et al.* (eds.), *Expanding the Boundaries of Intellectual Property* (Oxford 2001), ch. 17 and Mr. Justice Laddie, “Copyright: Over-strength, Over-regulated, Over-rated” (1996) 5 E.I.P.R. 253.

<sup>66</sup> G.J. Sophar, “The Nature of the Problem” in L.H. Hattery and G.P. Bush (eds.), *Reprography and Copyright Law* (Washington DC 1964), ch. 1.

that "there's some cynicism in the book industry that somebody will fill his shoes fairly quickly."<sup>67</sup>

In all these circumstances, the extension of a further remedy to the claimant in *Borders* must appear a questionable policy. We do not want to say what should be done, for we do not know. Why the Court of Appeal thinks it does know is not a function of its superior knowledge, for it made up its mind about what would be just in a way which was itself unembarrassed by any real understanding of the policy issues involved, or any real concern for the proprieties of adjudication. For those wishing to mulct defendants on this basis, it is extremely tempting to proceed on the claimed authority of *Blake*, with the results of muddled law and ill-judged policy which are becoming all too familiar.

## VI. CONCLUSION

In *Borders*, the Court of Appeal has engaged in judicial legislation which is unwise because the court does not understand the problem for which it is trying to legislate. This, however, is not the main point which we wish to make. In all areas of policy formulation, not merely the law, the possibility of error such as that perpetrated in this case emerges only because one gives up the restraints of respect for previous wisdom and pursues abstract principle, in this case "justice," whatever that means. Common law adjudication is meant to guard against the possibility of radical error of this sort, but *Borders* is yet more evidence that the first thing crushed in the passage of the restitutionary juggernaut set in motion by *Blake* is the legal respect for previous wisdom institutionalised in the common law by precedent.

One looks in vain in *Borders* for an appreciation of the value of the constraints imposed by precedent, even when one acknowledges that this can play a positive role in appeal courts only when sophisticatedly combined with a further appreciation of what can be done to move beyond those constraints whilst still respecting them. As the Court of Appeal does not just simply say what it thinks is just and entirely ignore precedent, it would be wrong to say that the court shows no feeling for common law adjudication whatsoever. But the feeling it displays is vestigial. For, having decided in advance that Jordan's case had no merits, the court does not seek to be guided by authority but interprets the authority tendentiously, or ignores it, in order to realise an idea of justice arrived at by some other means. In *Borders*, an ignorance of the economic and legal policy issues raised by the case led the court to

<sup>67</sup> Hanks, note 4 above.

the erroneous belief that justice requires that Jordan be most thoroughly mulcted. The nuanced balancing of the interests of the claimant and the defendant which characterises the common law of remedies for breach of obligations, and which is not entirely absent even from the law of exemplary damages, which is the common law of obligations' poorest doctrine, is ironed out so that the law of remedies may better serve only the claimant's interests.

The result is bad law (adjudication) and bad policy (judicial legislation), and that one can say this in respect of even this defendant tells us that something is going seriously wrong in the course of the process of improving the position of the claimant on the claimed authority of *Blake*. Who knows but that, at the end of this process, the common law of remedies may well appear so unnuanced, unbalanced and unfair that it may be thought to cry out for an improvement which it is believed can be supplied only by importing a respect for "proportionality" derived from the European Convention on Human Rights.

